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DATUK M KAYVEAS & ANOR

v.

BAR COUNCIL

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HIGH COURT MALAYA, KUALA LUMPUR
LAU BEE LAN J
[CIVIL APPEAL NO: R-17B-12-2005]
6 JULY 2010

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LEGAL PROFESSION: *Professional discipline - Misconduct - Breach of stakeholder term under property sale and purchase agreement - Whether would amount to misconduct under Legal Profession Act 1976 - Whether such breach not merely contractual but amounted to breach of trust and breach of solicitor's undertaking*

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The appellants, partners in a firm of solicitors, were found guilty of misconduct under s. 94(3)(o) of the Legal Profession Act 1976 ('LPA') by the Disciplinary Committee ('DC') established under the LPA and were fined RM5,000 each. The Disciplinary Board ('DB'), also constituted under the LPA, affirmed the DC's finding. The instant appeal

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by the appellants was against the DB's ruling. The appellants' firm had acted for the vendor company in a transaction for the sale of a piece of land. Certain monies were deposited by the purchaser's solicitors with the appellants' firm as stakeholders pending the completion of the transaction. However, before the transaction was concluded the

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appellants' firm released part of the stakeholder monies to an individual in the vendor company. The release of the monies came to light when the purchaser requested for the stakeholder monies to be returned for them to redeem the land from the vendor's chargee. The purchaser lodged a complaint with the respondent but withdrew it after he was reimbursed the amount that had been paid out from the stakeholder

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monies together with interest. The respondent on its own motion, pursuant to s. 99(3) of the LPA, initiated disciplinary proceedings against the appellants who argued that they should not have been found guilty of misconduct as their stakeholder breach was merely a contractual one and that the purchaser had suffered no loss.

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Held (dismissing appeal with costs):

(1) From the decided authorities, it was evident that the relationship of a solicitor (stakeholder) to the vendor and purchaser was not merely one of contract but was a fiduciary one *ie*, there was a trustee and

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beneficiary relationship and therefore the breach of duty as stakeholder was a breach of fiduciary duty. (para 14)

(2) The appellants were clearly described as stakeholders in the sale and purchase agreement and the express terms of the stakeholding was, *inter alia*, to use part of the balance of the purchase price to redeem the property and only thereafter release the balance if any to the vendor. However, in releasing RM195,199.94 to Ahmad Naslizan, the appellants had breached their stakeholder duties as the sum was released before redemption of the property; to a person who was not the vendor; and no consent of all parties had been obtained as was required by the Bar Council's Conveyancing Practice Rulings 1997 - para. 26, LPC 11 November 1989 and LPC 7 September 1985 - and by the common law principle on the duties of a stakeholder. (para 15)

(3) Although the transaction in question occurred in 1996 before the enactment of para. 26 of the Bar Council's Conveyancing Practice Rulings 1997, in the light of the historical origins of the latter, it could be argued that the legal position pre-1997 was as intended by LPC 11 November 1989 and LPC 7 September 1985 - that a solicitor as stakeholder was duty-bound not to part with the stake but had to hold the same as trustee for both parties pending the outcome of the future event. (para 13)

(4) The appellants' breach of their stakeholder duties, apart from being a breach of trust, was akin to a breach of a solicitor's undertaking amounting to professional misconduct. There was no justification therefore to interfere with the findings of the DC. (paras 16, 20 & 22)

Case(s) referred to:

Au Kong Weng v. Bar Committee, Pahang [1980] 1 LNS 4 FC ***(refd)***

Burt v. Claude Cousins & Co Ltd [1971] 2 QB 426 ***(refd)***

Dato' Seri Au Ba Chi & Anor v. Malayan United Finance Bhd & Anor [1989] 2 CLJ 801; [1989] 1 CLJ (Rep) 460 HC ***(refd)***

Gana Muthusamy v. Tetuan LM Ong & Co [1998] 2 CLJ 945 HC ***(refd)***

Keith Sellar v. Lee Kwang & Tennakoon V Lee Kwang [1980] 1 LNS 36 FC ***(refd)***

Kuldip Singh & Anor v. Lembaga Letrik Negara & Anor [1982] 1 LNS 73 HC ***(refd)***

OCBC Bank (Malaysia) Bhd & Ors v. Lee Lee Fah & Ors And Another Appeal [2000] 1 CLJ 71 CA ***(refd)***

Re a Solicitor [1972] 2 All ER 811 ***(refd)***

Law Society of Singapore v. Lim Kiap Khee [2001] 3 SLR 616 ***(refd)***

Selvaratnam Vellupillai v. Dr Jayabalan Karrupiah [2009] 1 CLJ 872 FC ***(refd)***

Sorrell v. Finch [1977] AC 728 ***(refd)***

Toh Theam Hock v. Kemajuan Perwira Management Corp Sdn Bhd [1987] 2 CLJ 26; [1987] CLJ (Rep) 400 SC ***(refd)***

Legislation referred to:
Legal Profession Act 1976, ss. 94(3)(o), 99(3)(o)

Legal Profession Act [Sing], s. 83(2)(h)

For the appellants - M Puravalen; M/s Valen, Oh & Partners
For the respondent - Rabindra S Nathan (Allister Tan with him); M/s Shearn Delamore & Co

Reported by Ashok Kumar

JUDGMENT

Lau Bee Lan J:

Decision

[1] The appellants have appealed against the decision of the court made on 10 September 2009 affirming the order of the Disciplinary Board dated 17 March 2005 whereby each of the appellants were imposed with a fine of RM5,000 each payable to the Discipline Fund within one month from the date of the said order and in default, the appellants would be suspended from practice as an advocate and solicitor until payment of the said fines.

The respondent is the Bar Council. The Bar Council intervened pursuant to s. 99(3) of the Legal Profession Act 1976 ("the LPA") after the original complainant withdrew the complaint.

[2] The salient facts of the case are not disputed and are as follows. The complaint emanates from a sale and purchase agreement ("the SPA") (pp. 24-42 appeal record (AR)) between Jordone Corporation Sdn Bhd ("the purchaser") and Avacado Corporation Sdn Bhd ("the vendor"). Under the SPA, Jordone bought a piece of land held under Geran Mukim 452, Lot 1910, Mukim Cheras, District of Ulu Langat at an agreed price of RM2,048,000.60 (p. 43 AR). The appellants were the vendor's solicitors whilst M/s Faeizah Kerk Bong & Associates were the purchaser's solicitors. The purchaser obtained a loan facility from Bank Bumiputra Malaysia Bhd for RM1,222,000 (p. 18 AR). There was a differential sum between the loan amount and the purchase price of RM621,200.54 (RM2,048,000.60 - RM 204,800.06 - RM1,222,000) which sum was forwarded by the purchaser's solicitors to the appellants as stakeholders on 23 August 1996 as per the purchaser's solicitors' letter dated 29 October 1996 (p. 46 AR). The differential sum forms part of the balance of the purchase price of RM1,843,200.54

(RM621,200.54 + RM1,222,000) under the SPA. The terms of the stakeholding on which the appellants received the differential sum are expressly provided in cls. 2(1) and 2(4) of the SPA (pp. 27-28 AR). *Vide* its letter dated 31 October 1996 (p. 47 AR), the appellants informed the purchaser's solicitors that they received a redemption sum from Hongkong and Shanghai Bank ("HSBC"), the vendor's bank but the purchaser did not agree with the redemption statement in the sum of RM4,136,718.66. *Vide* a letter dated 17 April 1997 (p. 55 AR) the purchaser's solicitors informed the appellants that an agreement had been reached with HSBC whereby HSBC agreed to accept RM2,100,000 as the redemption sum. The appellants were then requested to forward the sum of RM621,200.54 held by them as stakeholder to the purchaser's solicitors for the latter to redeem the property. Further sums of RM256,799.46 (sum intended to cover the shortfall in the redemption sum) and RM143,200.54 (which the appellants requested *vide* letter dated 19 May 1997 (p. 60 AR) to attend to the discharge of charge) had also been forwarded to the appellants. Eventually it transpired that the purchaser's solicitors had to attend to the discharge of charge. All the monies held by the appellants as stakeholders had to be released to the purchaser's solicitors to be paid over to HSBC in order to redeem the property. *Vide* their letter dated 23 May 1997 (p. 66 AR), the appellants forwarded to the purchaser's solicitors RM143,200.54, RM256,799.46 and RM426,000 (instead of RM621,200.54), thus leaving a sum of RM195,199.94 unaccounted for. In response to the purchaser's solicitors' letter dated 1 July 1997 demanding for the unaccounted sum of RM195,199.94 (pp. 68-69 AR), the appellants admitted in their letter dated 11 July 1997 (p. 70 AR) and their letter of explanation dated 9 November 2000 (pp. 72-73 AR) that they had released the sum of RM195,199.94 to an individual named Ahmad Naslizan who represents the vendor.

[3] The court has considered the outline submission (under covering letter dated 11 May 2009) (encl. 12) made by learned counsel for the appellants, the outline submissions of the respondent (dated 14 May 2009) (encl. 14) and the authorities cited on behalf of the respondent. The court's findings are the following.

[4] The court agrees with the respondent's submission that the appellants had made the admissions particularised at para. 17 of respondent's outline submissions namely:

(i) its letter dated 11 July 1997 (p. 70 AR);

(ii) its letter dated 30 July 1997 (p. 64 AR);

(iii) Consent judgment dated 15 May 1998 (pp. 78-79 AR); and

(iv) its "explanation letter" to the disciplinary board dated 9 November 2000 (pp. 72-73 AR at para. 2.2).

[5] From a perusal of the appellants' outline submission (encl. 12), the court agrees with learned counsel for the respondent that the thrust of the appellants' appeal is in respect of ground 4 of the memorandum of appeal, ie:

> The Honourable Disciplinary Board erred in law and in fact when it had decided on a wrong issue, ie, "Whether the Appellant were liable for breach of duty as a stakeholder". The correct issue that needed to be decided upon is "Whether under the circumstances of the case there is "misconduct" on the part of the Appellant which is unbefitting of an Advocate and Solicitor as defined under Section 94(3)(o) of the Legal Profession Act, 1976".

[6] Learned counsel for the appellants basically submitted:

(i) breach of duty as a stakeholder is merely a breach of contract;

(ii) the initial complainant (the purchaser) suffered no loss; and

(iii) the appellants should not be found guilty under s. 94(3)(o) of the LPA.

[7] The Disciplinary Committee ("DC") in its report at para. 3 (pp. 92-96 AR at p. 95) stated, *inter alia*, "The (DC) has taken note of the authorities cited and take the view that notwithstanding that there was as at the time of the transaction no specific rule by the Bar Council relating to stakeholders, the general law is clear that there is an obligation on the part of the respondents to act in accordance with their obligations as stakeholders as set out in the SPA". The DC found the appellants guilty of misconduct in breach of s. 94(3) LPA and held "the view that the duty of a solicitor to act in accordance with the entrustment of moneys set out in the terms of the stakeholder is one of the cornerstones of good professional behaviour, the breach of which amounts to conduct unbefitting of an advocate and solicitor and accordingly, will render that solicitor to disciplinary action".

[8] Learned counsel for the respondent drew to the court's attention the rulings of the Bar Council on the duties of a stakeholder:

> (a) Rights and Duties of Solicitor acting as Stakeholder
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> The Committee agreed with the opinion expressed that as a stakeholder, the Solicitor acts for both parties. The solicitor's attention should be drawn to [1989] 2 CLJ 801 (LPC 11 November 1989);

(b) Unused disbursements

If the solicitor is acting for the Purchaser only, he must return disbursements unless he has given a Solicitor's undertaking to the Bank or to the Solicitors for the other party. If the Solicitor is acting as a stakeholder, then he cannot return the money without the consent of the other party (LPC 7 September 1985);

(c) Terms of Stakeholding to be strictly adhered to

A solicitor acting as stakeholder for 2 or more parties must strictly adhere to the terms of the stakeholding at all times. No money or document by a solicitor as stakeholder shall be released, utilized, applied or otherwise dealt with by such solicitor except in accordance with the terms of the stakeholding or with the express consent of all relevant parties. (Bar Council's Conveyancing Practice Rulings 1997 - paragraph 26).

[9] It is evident that the case referred to in LPC 11 November 1989 is the case of *Dato' Seri Au Ba Chi & Anor v. Malayan United Finance Bhd & Anor* [1989] 2 CLJ 801; [1989] 1 CLJ (Rep) 460. In *Dato Seri Au Ba Chi* (*supra*), the learned Judge referred to a passage from the dissenting judgment of Lord Denning on the duties of an estate agent stakeholder in the case of *Sorrell v. Finch* [1976] 2 All ER 371 at p. 376 (upheld by the House of Lords) and which was accepted and applied in *Kuldip Singh & Anor v. Lembaga Letrik Negara & Anor* [1982] 1 LNS 73; [1983] 1 MLJ 257, a case of almost similar nature. Thereafter His Lordship stated "Bearing these cases in mind it seems proper to accept the view that generally the duty of a stakeholder is to hold the stake *in medio* pending the future outcome of a future event; that he holds it as trustee for both parties to await that event, and that until that event is known it is his duty to keep it in his own hands".

[10] It was submitted on the respondent's behalf that the 1997 Bar Council rulings are in substance a compilation of previous rulings which were already in existence. I find there is merit in this as it can be gleaned from the "introduction" to the Bar Council's Conveyancing Practice Rulings 1997 where Dr Cyrus V Das, the then President of the Bar Council said:

The Bar Council is called upon from time to time to give Rulings as to matters of practice and etiquette. These Rulings are generally made *ad hoc* as a result of specific queries made by Advocates and Solicitors or members of the public.

However, though such Rulings arise from specific queries quite often they relate to matters of practice which may recur from time to time. *Hence the Bar Council is of the view that it would be in the interests of the Profession as a whole to collect and revise its existing Rulings and compile them for ease of reference.*

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All previous Rulings not herein reproduced are deemed revoked. **These Rulings have also been revised and made to harmonise** with the Legal Profession Publicity Rules 1997 made by the Bar Council under Section 77 of the Legal Profession Act 1997 with the
B approval of the Attorney General. (emphasis added)

[11] Other cases pertaining to the duties of a stakeholder are:

(i) *Toh Theam Hock v. Kemajuan Perwira Management Corp Sdn Bhd* [1987] 2 CLJ 26; [1987] CLJ (Rep) 400 at p. 402; [1988] 1 MLJ
C 116 SC at p. 118 B-D left; and the Supreme Court's acceptance of Lord Denning's dissenting judgment on the liability of an estate agent or solicitors receiving a deposit as a stakeholder (in *Burt v. Claude Cousins & Co Ltd* [1971] 2 QB 426) and which was accepted by the House of Lords in *Sorrell v. Finch* [1977] AC 728 (see p. 118
D F-H);

(ii) *OCBC Bank (Malaysia) Bhd & Ors v. Lee Lee Fah & Ors And Another Appeal* [2000] 1 CLJ 71 at p. 78; [2000] 1 MLJ 134 CA at p. 143 E-F (following *Toh Theam Hock* (*supra*) and *Kuldip Singh* (*supra*)); and
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(iii) *Selvaratnam Vellupillai v. Dr Jayabalan Karrupiah* [2009] 1 CLJ 872; [2009] 1 MLJ 794 FC.

[12] In the appellants' outline submission the appellants conceded that "the DC has found that there is a breach of a stakeholder term". In
F my view the breach of duty as a stakeholder is not only a breach of contract but is a breach of the rulings of Bar Council following the decision of *Dato Seri Au Ba Chi & Anor v. Malayan United Finance Bhd & Anor* [1989] 2 CLJ 801; [1989] 1 CLJ (Rep) 460 at p. 803 C-H left with regard to the status of a solicitor as stakeholder which I have
G alluded to in paras. 8 and 9 above.

[13] Thus, in this present case the transaction in question occurred in 1996 before the enactment of para. 26 of the Bar Council's Conveyancing Practice Rulings 1997. However in the light of the
H historical origins of the latter, it is my humble view it can be argued that the legal position pre-1997 is it was intended even *vide* LPC 11 November 1989 and LPC 7 September 1985 that a solicitor as stakeholder is duty bound not to part with the stake but he has to hold the same as trustee for both parties pending the outcome of the future
I event. (see *Dato Seri Au Ba Chi* (*supra*)).

[14] From the decided authorities what is evident from the definition of a stakeholder is that the relationship of a solicitor (stakeholder) and the vendor and purchaser is not merely one of contract, but is a fiduciary one, ie, a trustee and beneficiary and therefore the breach of duty as a stakeholder is a breach of fiduciary duty.

[15] The appellants were clearly described as a stakeholder in cl. 2(1) of the SPA. The express terms of the stakeholding as in cl. 2(4) of the SPA was, *inter alia*, to utilise part of the balance of the purchase price of RM1,843,200.54 for redemption purposes and only thereafter release the balance, if any to the vendor. However in releasing RM195,199.94 to Ahmad Naslizan, the appellants had breached their duties as a stakeholder as:

(a) the said sum was released before the redemption of the said property;

(b) the said sum was released to a person who was not the vendor; and

(c) no consent of all parties was obtained as required by the Bar Council's Conveyancing Practice Rulings 1997 - para. 26, LPC 11 November 1989 and LPC 7 September 1985 and the common law principle on the duties of a stakeholder (see *Dato Seri Au Ba Chi* (*supra*)).

[16] The other bone of contention of the appellants is a contractual breach cannot *ipso facto* amount to a misconduct in law as the appellants had been liable to compensate the losses I have addressed above my rationale as to why the breach committed by the appellants is not only *per se* a contractual breach but also a fiduciary breach as a stakeholder under the SPA. It was held by the Federal Court in *Au Kong Weng v. Bar Committee, Pahang* [1980] 1 LNS 4; [1980] 2 MLJ 89 at p. 91 D-E and followed in *Keith Sellar v. Lee Kwang & Tennakoon V Lee Kwang* [1980] 1 LNS 36; [1980] 2 MLJ 191 FC at p. 194 G-I that:

> There are no closed categories of professional misconduct. One of the most fundamental duties of an advocate and solicitor, recognised for as long as the profession has been in existence, is that he must honour to the utmost the promise or undertaking given in a professional capacity.

[17] Thus in the context of this case, by accepting the differential sum deposited with them as stakeholder, the appellants are bound to honour and fulfil their duties as stakeholder and in breaching their duties as stakeholder it is akin to breach of a solicitors' undertaking which amount to professional misconduct.

[18] Apart from breach of contract, the release of the stakeholder sum also amounts to negligence and it may amount to misconduct. Support can be found in the case of *Re a Solicitor* [1972] 2 All ER 811 at p. 815, where a solicitor was in breach of the accounts rules, Lord Denning said that "negligence in a solicitor may amount to professional misconduct if it is inexcusable and is such as to be regarded as deplorable by his fellows in the profession". This principle was adopted in *Law Society of Singapore v. Lim Kiap Khee* [2001] 3 SLR 616 at p. 624 B-C, where the court of three judges held the solicitor (respondent) in the circumstances of the case deliberately disregarded his undertaking as a stakeholder to pay both the 8% and 5% of the purchase price which seriously undermined the integrity of the profession and bring it to disrepute which conduct constitutes grossly improper conduct and which *ipso facto* would also be an act unbefitting an advocate and solicitor under s. 83(2)(h) Legal Profession Act (Cap 161, 1994 Edn).

[19] In the circumstances of this case the Disciplinary Committee found "the respondents' (appellants) counsel did not give any basis for the belief by the respondents that the redemption sum was less than the balance purchase price other than reliance on statement of the managing director of Avacado Corporation. Had the respondents taken the usual prudential practice of obtaining the redemption statement from Hongkong Bank in order that they would have been in a position to discharge their duty as set out in cl. 2(4) of the SPA, the respondents would have been aware that the redemption sum in respect of the property far exceeded the balance purchase price". Here negligence need not be proved as consent judgment was entered against the appellants by the purchaser on 15 May 1998 after action was filed in the Sessions Court Kuala Lumpur Summons No. 2-52-8010-97 for the sum of RM195,199.94 with interest at 8% from 13 November 1997.

[20] In any event, the breach of the terms of the stakeholding is a breach of trust as the appellants held the stake monies in trust for both the vendor and the purchaser and are thus liable for breach of their obligation as a stakeholder. The Federal Court in *Selvaratnam Vellupillai* (*supra*) found such a breach amounts to misconduct when it affirmed the finding of the DC that the appellant was guilty of misconduct; however it set aside the DC's recommendation of six months suspension from practice and which was adopted by the Disciplinary Board by substituting with a suspension of one month. At p. 810 para. 36 Zaki Azmi CJ said:

> We must not forget here that the appellant was acting as stakeholder for both the vendors and purchaser. Both were his clients. It is not as if he was acting only for one party to the transaction. That sum was

held by him not jut for the benefit of the respondent alone but rather for the vendors as well. He was therefore a trustee for both parties. The money he was holding in the client's account was meant to be paid to MOF Inc to redeem the property in question. He was holding the monies to await the vendors to pay him the difference and thereafter to pay MOF Inc to enable the property to be redeemed or if the agreement was later repudiated, he was to refund the money to the respondent.

[21] It must be borne in mind that this is case where the appellants were tried in a proceeding by their peers who are members of the legal profession and are therefore the best persons "to (know) and (appreciate) better than anyone the standards which responsible legal opinions demands of its profession." (*Gana Muthusamy v. Tetuan LM Ong & Co* [1998] 2 CLJ 945 at pp. 954 to 955). Even the learned counsel for the appellants in the appellants' submission admitted "It is acknowledged that professional ethics must be strictly enforced". It is in the public interest for the legal profession to maintain a high degree of professionalism and diligence at all times. Thus I am of the view that the release of the stakeholders' sum in contravention of the terms of the SPA which transgresses the position of trust emplaced on an advocate and a solicitor by their clients (who are members of the public) who are looking to them to protect their interest cannot but be regarded as deplorable by the profession.

[22] For the reasons given I find there is no justification to interfere with the finding of the DC that the appellants are in breach of s. 94(3)(o) LPA and which recommendation has been adopted by the Disciplinary Board *vide* its decision made on 17 March 2005 which accordingly imposed the penalty as stated in para. 1 above.

[23] Hence, I had dismissed the appeal of the appellants with costs.